IN THE MATTER OF MERCHANT MARINER'S DOCUMENT Z-197298
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Thomas Edward HOWELL

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1720

Thomas Edward HOWELL

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 31 July 1967, an Examiner of the United States Coast Guard at Mobile, Alabama, revoked Appellant's seaman's documents upon finding him guilty of incompetency. The specification found proved alleges that while serving as a fireman/watertender on board SS TEXACO MINNESOTA under authority of the document above described, on or about 15 December 1966, Appellant failed to possess the color sense required for a qualified member of the engine department by 46 CFR 12.15-5(b) and 46 CFR 10.02-5(e)(4), and that the deficiency existed at the time of hearing.

At the hearing, Appellant elected to act his own counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence certain medical records and the testimony of a Public Health Service doctor.

In defense, Appellant offered in evidence a written medical opinion and his own testimony.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specification had been proved. The Examiner then entered an order revoking all documents issued to Appellant, but "with leave granted . . . to obtain, upon proper application a Merchant Mariner's Document endorsed in entry ratings. . ."

The entire decision was served on 27 July 1967, Appeal was timely filed on 24 August 1967, and was perfected on 10 January 1968.

FINDINGS OF FACT

On 15 December 1966, Appellant was serving as a fireman/watertender on board the SS TEXACO MINNESOTA and acting under authority of his document.

Prior to this time Appellant had been holder of a Merchant Mariner's Document endorsed for "entry" ratings for which no physical examination is now required except that for a food handler's endorsement there must be certification of freedom from communicable disease.

On 23 November 1966, Appellant was examined at the U.S.P.H.S. Outpatient Clinic at Mobile, Ala., to determine whether he met the color vision requirements of 46 CFR 12-15.5(b) and 46 CFR 10.02-5(e)(4) for issuance of any endorsement as a Qualified Member of the Engine Department. He failed both the P.I.P. (Plates) and the Williams lantern tests.

On 15 December 1966, at the Marine Inspection Office, New York, Appellant produced a certificate from the U.S.P.H.S. Outpatient Clinic stating that he had passed the "lantern" test for color vision. On the strength of this (and on a satisfactory sea time) he was issued a document reflecting endorsements as "junior engineer," "oiler," and "fireman/watertender," in addition to the "entry" ratings which he already possessed.

On 4 April 1967, Appellant was again examined at the Mobile clinic, and the finding was: "Failed color vision -- decisively." The doctor who administered the tests used both the Pseudo-Isochromatic Plates, and the Williams lantern. In one series of flashes of the lantern he showed the same color ten times consecutively. Appellant never gave the same identification twice in succession.

On 9 May 1967, Appellant was examined by a private physician who had served in the Public Health Service for several years and who, after moving to private practice, had been a consultant in ophthalmology and otolaryngology at the Public Health Hospital in Mobile up to the time it was closed. This physician had known Appellant about twenty-five years earlier, and had known at the time that he had a "partial red-green color blindness." This physician reported on 16 May 1966, that, "With the Ishihara test [P.I.P] he has a typical red-green color blindness, but if he spends a few seconds he is able to read many of the plates with difficulty. However, by the lantern test he can easily

differentiate the vivid colors without difficulty."

On 10 July 1967, Appellant was examined at his own request at U.S.P.H.S. Hospital, New Orleans. The findings there were: "HRR-fail (red-green deficiency) Lantern Test -- failed red-green."

Color blindness is generally hereditary. A person does not become color-blind, nor, if he has the deficiency, does his condition improve or worsen.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that:

(1) The Examiner failed to give sufficient weight to the private physician's report;

(2) Appellant was tricked by unfair strategems used by the P.H.S. doctors at Mobile and New Orleans;

(3) Appellant's prior history in the Marine Corps and the Army, and his ability to drive automobiles successfully, show that his deficiency is "borderline" and would not prove inimical to safety at sea if he is permitted to serve in a QMED rating;

(4) Appellant's service as a wiper aboard SS MAYO LYKES during the pendency of his appeal shows that the Chief Engineer of that vessel would be willing to employ him in a QMED rating if a waiver were granted to restore his lost endorsements;

(5) The Examiner erred in revoking Appellant's document in its entirety since three ratings for which he was endorsed (the "entry" ratings) were not in question and no color sense is required as a prerequisite for their issuance.

APPEARANCE: Appellant, pro se.

OPINION

I

On Appellant's first point, the most in his favor that can be said is that the Examiner was presented with conflicting medical testimony. With respect to the report of the private physician, I take official notice that the regulations at 46 CFR permit that if an applicant fails the P.I.P. test he may submit proof of qualification under the "lantern" test. It is also acknowledged that, although the actual record of the test at New York which led

to the issuance of the QMED endorsements was not in evidence before the Examiner, the Investigating Officer admitted on the record that the certificate presented showed that Appellant had passed the "lantern" test.

The Examiner at hearing was thus presented two pieces of evidence that Appellant had passed the "lantern" test. The opinion presented by the private physician at Mobile was of greater probative value than the one admitted by the Investigating Officer to have been issued at New York.

Against this, the Examiner had to consider three positive records that Appellant had failed to pass either test, and he had the personal testimony before him of the physician who administered the test of 4 April 1967.

An examiner is not bound, in making a finding as to whether the evidence supports a finding of incompetency, by any one medical opinion. When competency is challenged in a proceeding under R.S. 4450 (46 U.S.C. 239) and the regulations at 46 CFR 137, an examiner is the trier of facts, and the decision as to whether a license, document, or endorsement should be revoked is his, not a doctor's. The basic principle is that if there is substantial evidence to support revocation the order must be upheld.

While the test is not the mere quantitative addition of expert opinions, it cannot be overlooked that the majority here was against Appellant and the evidence supporting the majority opinion of the doctors was of far greater probative value than that offered to support Appellant's view.

Since the evidence upon which the Examiner made his findings in this case meets the test of reliability and substantiality, Appellant's argument that the Examiner did not give enough weight to the private physician's opinion must fail.

II

Appellant's second complaint actually supports the reliability of the tests administered to him.

The fact that at one point in the Mobile examination of 4 April 1967 he was shown the same color in the lantern test ten times in succession and failed to give the same answer twice in succession does not lead to a belief that Appellant was "tricked," but does support an inference that Appellant was "guessing" at color identification and had been hoping that on the law of average he should make enough correct guesses to earn a "pass."

As to the alleged "trickery" of the New Orleans examination, Appellant protests that the regulations cover only acuity as to the colors red, green, yellow and blue, but that once he was shown "white," which he misidentified as "green" because the regulations do not cover "white." Appellant's testimony on this point at hearing is conclusive:

"EXAMINER: But you say you called white green?

"PERSON CHARGED: Yes, sir.

"EXAMINER: Because the regulations -- in other words, you weren't calling what you saw then?

"PERSON CHARGED: No, not really because I was familiar with these regulations that they call for the test to be given in red, blue, green and yellow, and there was white on the end, and it looked white to me and I called it green. I thought it must undoubtedly be a very light green, although it looked like bright red, I called it green." R-29.

If Appellant saw what looked like bright red, assumed it was white, and called it green, because he thought white would not be used in the test, the deceit involved is seen no be his, not the doctor's. Appellant here admits to guessing, which may be the explanation of his production of reports that he had passed the "lantern" test, through luck.

III

Appellant's third argument is without merit. He admits that once after being given a standard pre-enlistment test, in 1932 he was found color-blind. The Navy rejected him; the Marine Corps did not. This does not establish that he was found color- blind by one service but not by the other. Since only one test was involved, and its finding was "color-blind", the conclusion necessarily is that one service had a color vision requirement which the other did not.

As to Appellant's ability to drive an automobile, the matter is actually irrelevant to the issues in this case, but it is a fact of common knowledge that traffic authorities have long been concerned with the need to provide a signal system that would not prevent the color-blind from driving.

IV

When Appellant shows an opinion, generated during the pendency of his appeal, that he would be employable in a QMED rating if

granted a waiver, he is urging a matter beyond the limits of review of the Examiner's decision.

This is a matter that was not before the Examiner at hearing and could not have been properly before him even if it had been urged.

Examiners have been delegated the authority to make initial decisions after hearing under R.S. 4450; they may suspended or revoke documents; they may not issue documents nor issue waivers. Insofar as a waiver might be considered in the individual case of Appellant the route would have to be through those officials to whom the power to issue documents has been delegated.

A matter such as this is inappropriate for consideration on appeal from an order issued under an R.S. 4450 suspension or revocation proceeding.

V

I am inclined to agree with Appellant that it is inappropriate to revoke his document when only a qualification for endorsement as QMED was in question, even with "leave granted. . . to obtain, upon application a Merchant Mariner's Document endorsed in entry ratings."

This might be construed as leave to apply under 46 CFR 137.13-1, which is clearly inappropriate since it contemplates periods of waiting and "offenses." "Incompetence" is a "charge" under 46 CFR 137 but it is not an "offense;" it is a condition.

Also, "proper application" might be construed as requiring a physical examination for qualification as food handler, or as requiring approval of the Commandant under 46 CFR 12.02-21 for issuance of a document after revocation. Neither of these considerations would be equitable; nor should Appellant be required to "apply" at all.

46 CFR 137.20-170(d) authorizes an examiner who has determined that a person is "professionally incompetent in the grade of the license, certificate or document he holds, but is considered competent in a lower grade "to revoke the document involved" and "order the issuance of one in a lower grade."

Without debating whether color-blindness, which is a physical disability, is "professional incompetence" within the meaning of this subsection, it is obvious that these words were not tailored to include a situation as appears here.

It obviously was intended to cover reductions from master to chief mate, chief engineer to assistant engineer, or even QMED to wiper. But it was not intended to cover, for example, the revocation of an endorsement for pilotage in certain waters which might be found on a master's or mate's license. Nor does it cover the Ordinary Seaman and Messman (FH) endorsements involved here.

Until clarifying regulation can be promulgated, 46 CFR 137.20-170(d)is to be construed as applicable only to:

(1) licenses or certificates of registry which are issued in a grade, even if there are endorsements on it, when there is a lower grade to which the license may be reduced in which grade the person charged may be found competent, without question as to his qualification as to the endorsements, and when only his qualification for the primary denomination of the license a certificate has been found wanting; and

(2) documents on which the sole entry is a grade reducible to another grade and not containing endorsements for capacities not related to the field of the endorsement.

When only an endorsement on a license or certificate is involved, or when, as here, only an endorsement on a document is involved (even though the endorsement admits of reduction in grade) but unrelated endorsements appear on the document, only the endorsement questioned shall be revoked, not the license, certificate, or document itself, and the examiner will order that a new license, certificate, or document be issued, without application, in conformity with his order.

CONCLUSION

Insofar as the Examiner's findings in this case show that Appellant is incompetent to hold a QMED rating, they must be affirmed. Insofar as the Examiner's order purports to revoke Appellant's Merchant Mariner's Document, and to grant him leave to apply again for a new document, it must be modified.

ORDER

The findings of the Examiner entered at Mobile, Alabama, on 31 July 1967, are AFFIRMED. The order of the Examiner entered at the same place and date is MODIFIED so that the Merchant Mariner's Document issued to Appellant is not revoked, but that endorsements as a qualified member of the engine department are revoked. Other endorsements upon Appellant's Merchant Mariner's Document are not affected by this order. It is ORDERED that the endorsement as qualified member of the engine department (QMED) on Appellant's

document is REVOKED and that he be issued a document endorsing him for the entry ratings already held.

W.J. SMITH
Admiral U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 2nd day of August 1968.

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